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ABSTRACT

This paper traces the involvement of the federal government (through subsidy, regulation, judicial, and administrative agency activity) in the education of students with disabilities at the elementary, secondary, and higher education levels. Government involvement through subsidy in the 19th century was usually in the form of establishing special schools, including what is now Gallaudet University for students with hearing impairments. Higher education opportunities offered to students with disabilities were again expanded as a result of the G.I. Bill of Rights following World War II. Government involvement through regulation has included the Education for All Handicapped Children Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Finally, government involvement through the judicial branch has affected postsecondary education of students with disabilities in such cases as Brown versus Board of Education of Topeka and a number of cases concerning Section 504. Issues addressed by some of these cases include: (1) faculty academic freedom versus the student's right to appropriate accommodation, (2) course examinations, (3) provision of deaf interpreting services, and (4) the extent of accommodations required. Finally, government involvement through administrative agencies has included action of the Department of Education Office of Civil Rights. (Contains 42 references.) (DB)

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The Federal Government and Higher Education for Students with Disabilities

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Introduction

This paper will examine the relationship between the federal government and higher education as it relates to students with disabilities. It will begin with an historical overview of the role of persons with disabilities throughout history. It will trace the first involvement of the government in the education of students with disabilities at the elementary through secondary levels as well as the federal role at Gallaudet University, the only higher education institution for the deaf in the world. It will also examine the impact of the G.I. Bill of Rights on higher education.

It will also explore the role of government regulations related to the education of students with disabilities, first at the K-12 level with Public Law 94-142, and then through higher education with the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Finally, it will examine the role of the judiciary and the administrative agencies in interpreting the legislation affecting students with disabilities.

Overview

Education for students with disabilities is a fairly recent phenomenon. As recent as the "seventeenth and eighteenth centuries, Americans had mistakenly confused the inability to speak with imbecility: they concluded that

education would be wasted on the "deaf and dumb" (Valentine, 1991). In the 19th century "stemming from the social humanitarianism of France, the transcendental outlook of Germany, and the romantic ideals of England, a new 'American Humanitarianism' struck out in many ways... to help the blind, deaf and the handicapped" (Butts, 1947, p. 452). The concept of "mainstreaming" students with disabilities is an even more recent phenomenon, with the first instance of the word as a topic in the Current Index to Journals in Education not occurring until 1977 (Hourihan, 1980, p. 9).

Government Involvement through Subsidy

K-12

In the United States, in 1823, the state of Kentucky established the first state school for the deaf, to be followed in 1827 by Ohio, and in 1832 by New York City and Boston. 1833 saw the first school for the blind opened in Philadelphia (Weintraub, 1976, p. 96). In 1827, thirty five years before the Morrill Land Grant Act, Public Law 19-8 (P.L. 19-8) was enacted to grant land to the deaf and dumb asylum of Kentucky (Weintraub, 1976, p. 103).

Perhaps the earliest success story in the United States history of education for those with disabilities was the American Asylum for the Deaf and Dumb. Opened in Hartford Connecticut in 1817, "it was the first school in the United States to offer an education to deaf people, indeed to any

group of physically disadvantaged citizens" (Valentine, 1991). This school was founded under the leadership of Reverend Thomas Hopkins Gallaudet, who brought to fruition the dreams of prominent Hartford physician Mason Cogswell, that his deaf daughter might be educated. Gallaudet travelled to France to investigate the successful methods of the National Institute in Paris. Here Gallaudet met Laurent Clerc, an intellectually gifted deaf man, who would come to America and help Gallaudet establish the American Asylum (Valentine, 1991). Clerc was instrumental in raising funds by travelling the United States and appealing to religious values claiming that the school should serve "as a gate to heaven for those poor lambs of the flock who hitherto have been wandering in the paths of ignorance" (Valentine, 1991 p. 361). His success was evident in the $25,000 he raised. To this sum was added a grant of $5,000 from the Connecticut government, making it the first state to recognize the claims of its handicapped citizens for an education at public expense. Other states soon followed suit, subsidizing their citizens' attendance at the asylum. In fact, in some states, educating deaf children was a commitment that preceded the establishment of universal common schools (Valentine, 1991).

Postsecondary Education

Higher education for students with disabilities became a reality via what is now Gallaudet University. The school was founded in 1857 as the Columbia Institution for the Instruction of the Deaf and Blind (changed to the National Deaf Mute College in 1864, to Gallaudet College in 1954, and finally to Gallaudet University in 1986). A discussion of the establishment of Gallaudet should begin with a discussion of the background of its founder Amos Kendall. Kendall was an attorney of note who amassed his fortune as the patent lawyer for Samuel Morse, but who was most widely known as the most prominent player in Andrew Jackson's "kitchen cabinet", a role he won by carrying Kentucky for Jackson in the 1828 elections (Atwood, 1964, p. 4). The fact that Kendall was vocal in his anti-secession beliefs, and well known within Washington could not have hurt his standing as he appealed to Congress for support for his institution. Nor did he hurt his cause by soliciting Edward Miner Gallaudet, the 20-year-old son of Thomas Hopkins Gallaudet as the institutions first superintendent.

The school was made a college as the result of an act of Congress signed into law by Abraham Lincoln on April 8, 1864. "Through the admirable foresight and planning of Edward Miner Gallaudet,...Lincoln took the time in the days of his greatest stress to lend his ears to those who could

not hear" (Atwood, 1964, p. 18). This legislation would mark the first time that the federal government would play a role in the higher education of students with disabilities.

While Gallaudet would never become what Washington had envisioned as a National University, it has been a ward of the Federal government since its inception. In fact, the initial effort in education for the handicapped became law as a result of PL 38-50 which incorporated the school (Weintraub, 1977, p. 97). Today the school receives 75% of its $75 million budget in federal aid (Sinclair & Pianin, 1988). The first graduates of the collegiate course in June of 1869 had their diplomas signed by the President of the United States (at that time Ulysses S. Grant), as have all since. The federal support for the college might be summed up by General Garfield, a congressional supporter of the college who said in 1871:

> "That such an institution as the college had its origin in the midst of exhausting civil war, that appropriations have been liberally made for its support and development during a period when demands upon the public treasury have been heavy beyond precedent, that it stands out the first of its kind in the world, reveals lasting honor upon our government" (Atwood, 1964, p. 20).

This relationship with the federal government has not come without some loss of autonomy. Currently three members of congress, one from the Senate and 2 from the House of Representatives sit on the Gallaudet Board of Trustees (S. Russell, personal communication, October 27, 1993). This threat to autonomy was perhaps most evident during the student protests at Gallaudet in 1988. The protests erupted after it was announced that Elizabeth Ann Zinser, a hearing person, was selected over two hearing impaired finalists for the position of President of the University. The student protest virtually shut the campus down for a week (Gannon, 1989). As the student's cause was picked up by the national press, support began to pour in from across the country as well as from faculty and administrators on the Gallaudet campus.

After a few days of the protest, Rep. David Bonior, a Congressman from Michigan and a member of the Gallaudet Board of Trustees, was quoted in a front page article of the Washington Post saying he feared that the controversy over the appointment of Zinser could hurt future federal funding of the University (Sinclair & Pianin, 1988). Although the threat was only implicit, the fact that it came from the chief deputy majority whip, along with the fact that he alluded to support from Senate Minority leader Dole, House Majority Whip Coelho, and President Bush, gave the words an

added weight. In typical political fashion, Bonior declined to indicate that he would encourage Zinser to step down, but attempted to make his point clearer by adding " It's just important for the institution and the people who go to Gallaudet to feel a sense of pride for one [of their own] rising to the top" (Sinclair & Pianin, 1988).

The twentieth century marked the beginning of the movement of significant numbers of students with disabilities into higher education. Comprehensive source material on students with disabilities in higher education is rare (Jones, 1971). In the early part of the century "an occasional handicapped person attended college, but for each one, many more were refused because of assumptions that their disability would prevent them from achieving a higher education" (Redden, 1979, p. vii).

> "While there are occasional formal reports of an individual with a disability successfully graduating from college in the years that follow (the 1860's), there were no programs established for general support of such students in institutions of higher learning until the mid-1940's" (Jarrow, 1987).

The next major federal initiative impacting higher education and students with disabilities since the granting of Gallaudet's charter were two other federal acts: P.L. 78-16 (the Disabled Veterans Vocational Rehabilitation Act),

and P.L. 78-346, (Officially the Serviceman's Readjustment Act of 1944, but more commonly, The G.I. Bill of Rights).

The roots of these acts were deep, dating back to 1781, when "the Continental Congress voted pensions for men disabled in service....to help a man get back to the equality of opportunity he would have had were he not disabled in service" (Hurd, 1946, p.29). These acts paid "all training expenses for returning veterans including books, equipment, and tuition fees. Training courses may last as long as 4 years" (Hurd, 1946, p.37). Strom (1950), illustrates the impact of the veterans on enrollment, with veterans accounting for almost 50% of enrollment (See Table 1).

Table 1

Enrollment in U.S. Higher Education following World War II

Year	Total enrollment	Enrollment of Veteran's
1946	2,078,095	1,080,396
1947	2,338,226	1,122,378
1948	2,408,249	1,021,038

Perhaps the most visual impact of the veteran's legislation was the increased presence of students with disabilities on college campuses. This increased presence did not necessarily bring with it a change in college policy, as students were mainstreamed with their non-disabled peers right from freshman orientation (Helberg &

Aaronson, 1950). "At this school the paraplegics received no special privileges. They signed up for the regular curriculum and attended regular classes, and in order to graduate, they were required to obtain the same credits as the other students" (Strom, 1950, p. 43). In general, "the disabled student was considered to be similar to the other students in more ways than he was dissimilar" (Strom, 1950, p.2). Returning Vietnam veterans swelled the rank of students with motor, auditory, visual, or systemic-neurological handicaps in the second half of the twentieth century (Stillwell & Schulker, 1973).

Government Involvement through Regulation

K-12

Another piece of federal legislation to have a major impact on higher education, albeit secondarily, was P.L. 94-142, the Education for All Handicapped Children Act. This act, signed into law by President Gerald Ford on November 29, 1975, "provides that all children are entitled to a free, appropriate public education, regardless of handicap....As a direct result of this statute, the number of students with disabilities who received full secondary school educational opportunities grew dramatically" (Jarrow, 1991). Another component of P.L. 94-142 was that the education take place within the least restrictive

environment. This brought many students with disabilities out of self-contained classrooms and into the mainstream in an integrated setting with their peers. This setting included the "college track" for many students who heretofore had been placed on the "vocational track".

Postsecondary Education

The two federal acts with the most direct impact on higher education and students with disabilities were Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Both of these would fall into the category of what Hines and Hartmark (1980) termed "social regulations". The first "tracks the language of the Great Civil Rights Act of 1964 which mandated an end to discrimination against long oppressed minority groups" (Redden, 1979, p.2). It is also similar to Title IX of the Educational Amendments of 1972, protecting women against discrimination based on gender (Nelson & Nelson 1980, Scott, 1990).

This act marked a major shift in the disability rights movement. "The first half of the current decade [1970's] has come to be known as the era in which the battle cry for public policy advances changed from charitable solicitations to declarations of rights" (Weintraub, 1976, p. 5). The Rehabilitation Act ushered in this new era, mandating

programmatic access to higher education for students with disabilities.

The Act stated that "no otherwise qualified handicapped individual ...shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to any discrimination under any program or activity receiving federal financial assistance" (Guide to Disability Civil Rights, 1980). Regulations such as this have left some in the higher education community feeling that the government was acting more like a creditor than a patron (Finn, 1978). While some in the higher education community decried the increasing involvement by the government in their affairs, the Sloan Commission on Government and Higher Education recognized that higher education could not exempt itself from the regulations common to other sectors of American society (Edwards, 1980).

Institutions were advised not to expect federal funds for assistance in implementation of the regulations in the Rehabilitation Act (Buchanan, 1977). However, the American Council on Education, through HEATH (Higher Education and the Handicapped), did provide technical assistance in meeting the regulations under authorization from The Department of Education, Office for Civil Rights. In addition, the Department of Education, Office for Special Education and Rehabilitative Services funded the Regional

Education Program, which in turn funded 14 "model programs" at a variety of higher education institutions. Information on these model programs was then disseminated through HEATH to the higher education community. Among the model programs were programs at California State University at Northridge, Georgia State University, and the State University of New York at Buffalo (Anderson, Hartman & Redden, 1981).

Most recently, P.L. 101-336, The Americans with Disabilities Act (ADA), signed into law by President Bush on July 26, 1990, it has been called "the most important piece of federal civil rights legislation enacted in the past quarter century" (Kohl & Greenlaw, 1992). The ADA extended the rights of the disabled even further than the Rehabilitation Act, extending coverage protections to all institutions regardless of whether they receive federal aid.

> "Because the ADA is in large measure modeled on the legal definitions and interpretations developed under Section 504 and because most colleges and universities have been required to comply with Section 504 since 1973, the ADA will probably have less impact on higher education than on other segments of American life" (Kaufman, 1991).

"Beyond this, however, passage of the ADA may signal the emergence of greater recognition of the hurdles faced by disabled individuals and a greater vigilance on their

behalf" (Kaufman, 1991). In addition, "enforcement of the ADA is expected to be more aggressive than that for Section 504 (HEATH, 1992).

The two areas of vulnerability for colleges and universities have been architectural and programmatic accessibility. By and large, the first area addressed was architecture. However, nowhere in higher education has there been more resistance to modifications for students with disabilities than in the area of academic accommodation. A 1976 survey commissioned by the U.S. Office of Education found:

> "when handicapped individuals did get into college, they were faced with other barriers: academic requirements which were not essential to the mastery of the subject matter, but automatically excluded some handicapped (such as a journalism school's typing requirement); the absence of auxiliary aids such as interpreters for the deaf or taped texts for the blind; lack of adapted housing or bathroom facilities for those in wheelchairs;...the list goes on" (Bailey, 1979).

One of the first accommodations recorded was an astronomy lecture at Gallaudet College by New Hampshire Congressman John W. Patterson in 1865. "Given in spoken language they will be rendered in sign language by an

interpreter" (Atwood, 1964, p. 21). Other accommodations that have developed over time in attempt to emphasize the measurement of a students' ability rather than their disability have included: taped textbooks from Recording for the Blind, readers, notetakers, attempts by faculty to verbalize what they write on the board, scribes, more/less light in classrooms, distributing tests, etc. in large print, preferred seating, and the taping of tests and papers (Rusalem 1962).

Government Involvement Through the Judicial Branch

"It has long been an accepted principle that well-documented educational institutions' decisions are entitled to deference" (Heyward, 1992, p. 172). This deference is not unique to higher education, "for courts have traditionally deferred to expertise in all esoteric areas" (Hobbs, 1981).

Although the case dealt with minority students and on the K-12 level, the Supreme Court had an effect on students with disabilities as a result of the 1954 Brown v. Board of Education of Topeka case which said:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide

it, is a right which must be available to all on equal terms" (Brown v. Board of Education, 1954).

This case would be invoked by many civil rights activists who argued that students with disabilities were being denied an education on equal terms.

The first case invoking Section 504 brought against a postsecondary institution was Southeastern Community College v. Davis (1979). In the case, Davis, a licensed Practical Nurse with a serious hearing disability, sought admission to an Associates degree program at Southeastern Community College so that she might become certified as a registered nurse. The Supreme Court stated that Davis could not require the nursing school to adapt the program so that the need to hear would be eliminated, upholding the schools decision that to do so would fundamentally alter the educational experience (Kaufman, 1991). They further held:

> "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications to their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federal funded program 'solely by reason of his handicap,', indicating only that mere possession of a handicap is not a

> permissible ground for assuming an inability to function in a particular context"(Southeastern Community College v. Davis 1979).

"It is important to remember that a failure to meet academic standards or criteria does not end the inquiry, it must also be established that there is no appropriate accommodation that will permit participation in the program" (Heyward, 1992, p. 182). In another case regarding admission to a health services field, in Pushkin v. Regents of the University of Colorado (1981), a medical doctor with multiple sclerosis was denied admission to a psychiatry residency program solely on the basis of his disability, and the district court ordered that Pushkin be admitted. The defendant appealed the case and the district court ruling was affirmed.

For some students with disabilities, auxiliary aids are necessary to ensure their ability to fulfill course requirements. Several court cases have addressed the need for auxiliary aids. Barnes v. Converse College (1977), showed that Section 504 obligates private colleges receiving federal assistance to provide auxiliary aids. In this case, the student needed the use of a sign language interpreter.

> "The court took the occasion to lament the 'plight' of the college 'which may be forced to make substantial expenditures of private monies to accommodate the

federal government's generosity' in providing such rights and remedies by means of the Act" (Section 504 Compliance Handbook (1979).

Two other cases involving public institutions found similar results. In University of Texas v. Camenisch (1981), the American Council on Education (ACE) and the National Institute of Independent Colleges and Universities (NIICU) filed a brief as a friend of the court in support of the university, clearly bristling at the intrusion by the government into the university's affairs. In the brief they stated:

> "To the extent that Mr. Camenisch did not have the interpreter services he needed, it was because he refused to pay for them...not because The University of Texas failed to meet its obligation not to discriminate against him 'solely' by reason of his handicap" (Brief Amici Curiae in Support of Petitioners in University of Texas v. Camenisch, 1981).

In the second case, United States v. Board of Trustees of the University of Alabama (1990), the US District Court ruled that the University may not deny auxiliary aids to students based on ability to pay or enrollment in non-degree programs.

Another area where the act has had an impact on higher education is in providing academic adjustments. Subpart E

of the Regulations deals directly with postsecondary education and sub section 104.44 c: addresses course examinations:

> "in its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient...shall provide such methods of evaluating the achievement of students...that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired ...skills (except where such skills are the factors that the test purports to measure)".

It is perhaps when "the long arm of the law" reaches so far as to enter the classroom, that the most resistance has been met. Although it appears fairly evident that a faculty member's right to academic freedom does not outweigh the student's right to appropriate accommodation (Jarrow, 1991), it has been less evident to some individual faculty members. In one celebrated case, a standoff occurred between a student and a math professor. In Campbell A. Dinsmore v. Charles C. Pugh and the Regents of the University of California (1989), a student with a math learning disability (dyscalculia) asked for a specific academic accommodation (extended time on examinations), backed by the appropriate documentation from the Office for Disability Services. The

faculty member refused, maintaining that no one had the right to dictate what went on in his classroom.

> "Perhaps the most significant aspect of this case is that the student filed a complaint against the institution with the Office for Civil Rights, but also filed a civil suit against the faculty member for abridgement of his civil rights and the court accepted the case" (Jarrow, 1993).

Government Involvement Through Administrative Agencies

Although there have been many cases related to section 504 and the ADA settled in the courts, many more are settled through negotiations between institutions and the Department of Education Office of Civil Rights (formerly the Department of Health Education and Welfare Office of Civil Rights). These decisions, disclosed through a letter of finding from the Office of Civil Rights are available only via a request under the Freedom of Information Act. In 1992, letters were issued to 46 colleges and universities finding them in violation of section 504 (Jaschik, 1993). Seven of the schools had violated Section 504 by making pre-admission inquiries of disability status. In many other cases, institutions were found in violation for having inaccessible buildings, for failing to provide sign language interpreters or for failing to make academic accommodations (Jaschik, 1993).

In a follow up study, this author filed a request pursuant to the Freedom of Information Act, requesting from the U.S. Department of Education Office for Civil Rights, all letters of finding issued to postsecondary institutions relating to Section 504 or the ADA between January 1, 1993, and August 30, 1993. A total of 59 letters were received. Three of these exonerated the institution. In the other 56, there were 22 instances where an institution had failed to make programs accessible (due to a need for structural modifications), 18 where the institution had failed to publicize their compliance, 14 cases where the institution had failed to provide an auxiliary aid or an academic accommodation, ten where they had failed to institute a grievance procedure pursuant to the act, nine who had violated the act because of their admissions policies (including several who had used pre-admission inquiries of disability status), four who had discriminated in terms of employment, and one which failed to provide accessible transportation. (Note, the total exceeds 56 because several schools were cited for more than one violation.)

Conclusion

In 1957, in Sweezy v. New Hampshire, the Supreme Court found the four essential freedoms of a university are to determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; 4) and who

may be admitted to study. It is this author's opinion that the federal involvement in higher education as it relates to students with disabilities has had an impact on numbers 1,3, and 4. As for who may teach, it plays a role limited to ensuring that no one is denied an opportunity to teach based soley upon their disability. As for how it shall be taught, the government has only acted to ensure that evaluations represent the student's achievement rather than the student's impaired skills. As for who may be admitted to study, the government has only intervened when a student has been denied access because of their disability.

After the dust settles from the recent legislation and the court and agency decisions, it is this author's opinion that the burden on institutions of higher education will be minimal. The benefits will be immeasurable, not just to the students who might have been denied access, but to the higher education and greater world community, as the Stephen Hawkings of the world leave their indelible mark.

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